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ABSTRACT

Much of the legal and regulatory public policy discussion has centered around the model of the community broadcasting station, a station which is licensed to serve a particular community and which broadcasts a combination of Public Broadcasting System-supplied and locally produced programs. Typically, these stations are controlled by a single state-charted entity. This centralism of control violates the spirit of Federal Communications Commission (FCC) regulations which call for local control and diversification. Though, in recent years, several court cases have touched on this sensitive issue, policy makers have not yet recognized the dichotomy between existing state operating structures and the principle of localism. The FCC should consider two alternatives: (1) a system of license priorities which encourages local funding and control; and (2) providing federal support to an alternative network of locally cnetered broadcasts. (EMH)

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STATE TELEVISION NETWORKS: LEGAL PROBLEMS IN THE FORGOTTEN HALF OF THE PUBLIC TELEVISION SYSTEM

By

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STATE TELEVISION NETWORKS: LEGAL PROBLEMS IN THE FORGOTTEN HALF OF THE PUBLIC BROADCASTING SYSTEM

by Frank W. Lloyd*

Much of the legal and regulatory public policy discussion in public television has centered around the model of the "community" station. Such a station is presumed to be licensed to serve a particular city or town, with a Board of Directors drawn from that community, providing its local population with both PBS-supplied network programming and locally produced and originated programming. There is one problem with the model: it just doesn't fit almost half of the 265 television stations in the public broadcasting system.

These are the stations licensed to the state educational television networks. These networks are diverse in structure and method of operation. But typically they are controlled by a single state-chartered entity (styled as a "Commission", "Authority", "Network" or "Board"). In some cases the network is operated by the existing State Board of Education (e.g., Georgia) or by the state University (e.g., Maine).

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* Executive Director, Citizens Communications Center, Washington, D.C. The author wishes to thank Tom La Faille a student intern with National Citizens Committee for Broadcasting, who compiled most of the factual research relied upon herein.

These networks are normally "centralized" on a state-wide basis in the true sense of this pejorative term, often misapplied to the national entitites of public broadcasting -- the Corporation for Public Broadcasting and the Public Broadcasting Service. Programming decisions are made centrally, for all communities in the state served by the networks. Large communities served by state network stations in some cases do not even have representation on the network's governing board. Program needs are ascertained, if at all, on a state-wide basis, and programs are produced at a central location.

While there are exceptions to this model, current research shows at least 18 state networks distributing simultaneous material to three or more locally allocated and licensed stations, all of which are licensed to the central network. The number of stations assigned to a single licensee range up to 13, averaging six stations per licensee. These 18 licensees (See Exhibit A), which fall within the basic universe of "state networks", for purposes of this paper, control 109 of public broadcasting's outlets. Incipient networks, with presently only one or two state-licensed stations, exist in several additional states.

A. The Central Paradox: Conflict With The "Localism" And Diversity Mandates Of The Communications Act And The Public Broadcasting Act

The existence and extent of these state network licensees immediately raises several critical paradoxes for anyone even remotely familiar with either: (1) the federal regulatory scheme for television generally, or (2) the specific goals and recent history of public broadcasting.

1. The FCC Localism Requirement

On their face, the operations of these stations appear to violate the statutory scheme, established by the Communications Act of 1934 and administered by the Federal Communications Commission, of assigning television channels to discrete local communities for the primary purpose of providing a service directed to the specific needs of those communities. This Congressional scheme of establishing local broadcast outlets is the core of the allocations structure of the Communications Act.

Local broadcast licensee ascertainment of and service to local programming needs has been the basic tenet of the FCC's regulatory stance towards commercial

broadcasting. It underlies the 1960 En Banc Programming Inquiry statement of licensee duties, the 1971 Ascertainment Primer and its recent modifications, the commercial television license renewal form, and FCC actions, such as the prime time access rule, to reduce the trend towards central network dominance of programming.

2. FCC Diversification Principles

A second fundamental theme in federal regulation of commercial broadcasting has been diversification of the ownership and control of broadcast outlets. It has long been held that:

> "Centralization of control over the media of mass communication is, like monopolization of economic power, per se, undesirable . . . It is accordingly firmly established that in licensing the use of the radio spectrum for broadcasting, we are to be guided by the sound public policy of placing into many, rather than a few, hands the control of this powerful medium of communications." 1/

These state networks would violate virtually all FCC rules established to further this diversification goal, were they commercial outlets. This includes the "duopoly" rules, which prohibit overlap of television signals of

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1/ First Report and Order, Docket No. 18110, 22 FCC 2d 306, 310 (1970).

stations owned by the same entity, and the multiple ownership rules, which sets a limit of seven television stations (five VHF) that can be owned, even on a national basis, by any single licensee. The FCC also has under current consideration a codification of similar restrictions on regional concentration of media control. It has proposed to limit any single licensee to no more than four broadcast outlets (of any type) to a single state.

In past and current rulemakings on this subject the FCC has stressed that its primary concern is not economic competition, but competition in the marketplace of ideas. As stated in the rulemaking on regional concentration, its most recent proposed rulemaking: "The new rules would bring about a diversity of voices and programming, the dual goals of the present regional concentration policy . . ."[1/]

There should, therefore, logically be no distinction made between commercial and public television in the implementation of these rules. Yet public broadcasting has been specifically exempted from the multiple ownership and duopoly rules. And the current regional concentration rulemaking is silent on whether it applies to public broadcasting networks. Presumably the state networks will

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1/ Notice of Proposed Rulemaking, Docket No. 20548, ___ FCC 2d ___ (July 23, 1975).

seek an exemption from it too, since its enactment would force the majority of them to divest existing licenses.

3. "Localism" vs. "Centralization" In Public Broadcasting

These twin principles -- localism and the prevention of centralized control over the potential diversity of programming choices -- have likewise been the professed hallmarks of public broadcasting policy. The Carnegie Commission Report spoke of the "bedrock of localism" upon which any national institutions to be structured into the public broadcasting system would be built. That Report was translated into the 1967 Public Broadcasting Act, leading to the creation of the Corporation for Public Broadcasting and the Public Broadcasting Service. And the public broadcasting licensees have resisted centralized dictation of their program schedules by either CPB or PBS ever since. The most recent manifestations of this have been the Station Program Cooperative and the push for earmarked pass-through funds to licensees in CPB appropriations.

But how can a centralized state network, which normally gives little or no automony to the local communities it is licensed to serve, nor even provides the resources

for specific programming on the local issues and needs of that community, fit comfortably within either of these structural concepts. It seems ironic that while arguing strenuously for local production and program choice when debating with national entities such as CPB or PBS, these station licensees themselves actually possess monopoly power to blanket a state with a simulcast, centrally produced program schedule. They are in fact absentee owners of station facilities in many communities.

B. Current Recognition of the Paradox

This anomoly has for the first time surfaced as a recognized and seriously debated issue, at least among a few regulators and communications lawyers, as a result of several events that occurred in the last year. These include (1) the 1975 FCC decision in the Alabama Educational Television Commission case, (2) a rulemaking petition to apply the FCC multiple ownership concentration rules to public broadcasting, (3) the FCC rulemaking on ascertainment by public licensees, and (4) an unresolved petition to deny the license of the Savannah station licensed to the Georgia State Board of Education, as part of an 8-station network.

The author was counsel of record for petitioners to deny in the AETC case (but is not counsel to the currently competing applicant in that case), is counsel to petitioners to deny in Savannah, and filed comments for various public groups in the two rulemakings mentioned. The public broadcasting ascertainment rulemaking, in fact, was instigated by a petition for rulemaking filed by the law firm with which the author is affiliated. This background has provided much of the research material from which this paper is written, but it should be considered by the reader in evaluating the viewpoint of the author in advancing the policy suggestions made herein.

1. The AETC Case

On January 1, 1975, the FCC, in an unprecedented action, denied renewal of the licenses of all nine stations of the state-controlled Alabama Educational Television Commission.[1/] This was the first time in its history that the FCC had denied license renewals on the ground of racial discrimination.

The decision itself did not deal with the question of the centralized institutional operations and simulcast programming of the Alabama state network. But by declaring

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1/ 50 FCC 2d 461.

the licenses open for application by other potential licensees, it inexorably set in motion a confrontation on these issues. In August, 1975, another group, Alabama Citizens for Responsive Public Television, did apply for three of the AETC stations. Their proposal will force the FCC to directly address the issue of centralization versus localism in state public broadcast allocations, in the resulting comparative hearing.

AETC is the oldest state public television network, founded in 1953. It mirrors many others in structure. It is controlled by five Commissioners appointed by the Governor. All program decisions are made by the central operating office in Birmingham. In contrast, Alabama Citizens proposes that each station's operations be coordinated directly by an executive committee of Board members drawn from the particular local service area and a local station manager for each station.

AETC simulcasts all programming -- national, syndicated, regional, and state-produced -- over the nine stations. Alabama Citizens proposes local program decision-making, and locally originated production at its three proposed stations.

AETC's reapplication for these licenses also raises the diversification of ownership issues common to many state networks. Even if Alabama Citizens were granted all three licenses, AETC would still hold 6 licenses in a single state. This is still two more than proposed as a commercial limitation in the Commission's regional concentration of control rulemaking. Two of the three stations Alabama Citizens is seeking have service areas that are significantly overlapped by other unchallenged AETC stations, raising the duopoly issue. It would seem that the new entrant would at least get a preference on these issues.

2. FCC Decision on Application of Multiple Ownership Rules To Public Stations

In December, 1974, two individuals active in the promotion of alternative format noncommercial radio and television stations, Jeremy D. Lansman and Lorenzo W. Milam, filed a petition asking for an FCC rulemaking on public broadcasting ownership concentration questions.

Rather than adopt a formal rule, the FCC issued an order in August, 1975 stating a case-by-case policy for future treatment of these issues.[1/] It did, however,

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1/ Memorandum Opinion and Order, RM-2493 54 FCC 2d 941 (August 13, 1975).

indicate that if another educational entity wished to use a channel that overlapped with another station licensed to the same entity and broadcasting the same programming, a preference would be given the new entrant, or at least a time-sharing arrangement would be encouraged.

Commissioner Robinson, joined by Commissioner Hooks, however, issued a separate call for total reexamination of FCC multiple ownership policies in public broadcasting: 1/

> At this point I am not prepared to say to what extent we should extend our multiple ownership, or concentration of control, rules to noncommercial licensees. However, the problem of concentration of control in on commercial "public" stations is a matter which I think is overdue for evaluation by the Commission. I am fully aware that in the past the Commission has paid no attention to such matters. In part this is because the Commission has historically paid little attention to educational ("public") broadcasting . . . [W]e now recognize that the time has come to take a second look at public broadcasting. I do not suggest that public broadcasting should be subjected to precisely the same kind of multiple ownership restrictions and concentration of control rules that we impose on commercial broadcasters. For one thing, the Commission itself has affirmatively encouraged much of the concentration -- particularly the creation of state-wide educational networks -- as a means of promoting educational broadcasting. I do not think that we should abruptly change from a promotional policy to a restrictive policy. Certainly we should not do so without a very long and careful look at the whole problem. However, I think it is time to acknowledge that this may very well be a problem. . .

1/ Id. at 951-52.

> [A]t the very least, we ought to take a closer look than we have done in the past and that we should undertake a further investigation of this entire matter in the very near future.

Such an investigation has not yet been held, despite Commissioner Robinson's and Hooks' repetition of their call for such an inquiry in a recent dissent to the FCC's failure to remove KQED's second, UHF allocation in San Francisco, for not using it since 1972.[1/]

3. FCC Decision Requiring Ascertainment By Public Broadcasters

In 1971, a petition for rulemaking was filed with the FCC seeking application of the formal requirements of ascertainment of local community needs and interests, and programming responsive to those needs, by public broadcasters. This rulemaking petition grew out of citizen group realization, growing out of the AETC case, that the FCC only required commercial licensees to document their commitment to the Act's localism mandate.

In 1973 the FCC held that in fact public broadcasters did have a similar duty to ascertain and be responsive to their local licensed constituency.[2/]

1/ KQED, Inc., FCC 76-269 (rel. March 26, 1976).

2/ Notice of Inquiry and Notice of Proposed Rulemaking, Docket 19812, 42 FCC 2d 690.

It held that, under the 1960 FCC En Banc Programming Inquiry Report and Policy Statement[1/] public broadcasters must also serve "to a significant extent, as outlets for local expression."

The Commission issued a broad call for comments on how this duty should be implemented and documented by public licensees, including "whether the existence of a state-wide educational broadcast system should have any effect on the ascertainment requirements imposed on member stations."

The Commission proposed specific noncommercial ascertainment rules in August, 1975.[2/] In the interim, the AETC final decision had suggested that public television licensees might well have even greater ascertainment and local program service duties than commercial stations, given their federal preference as to reserved allocations and use of federal tax funds for support.[3/]

In its 1975 Further Notice, the FCC noted and rejected the arguments of state network licensees that they

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1/ 44 FCC 2303.

2/ Further Notice of Inquiry and Further Notice of Proposed Rulemaking, Docket 19816, 54 FCC 2d 766.

3/ 50 FCC 2d at 472-73 and n. 17.

should be required to ascertain solely on a state-wide basis, and not also in the individual service areas to which its stations were licensed:

> Although we have carefully weighed all the arguments on this question, we do not believe that the implications of state-wide ascertainment can be reconciled with the local service policy which underlies our allocation of frequencies. We feel that state networks must conduct their ascertainment efforts so as to make contact with both leaders and the general public at the local level. 1/

A substantial outcry from state network licensees followed. AETC's comments, for example, attempted to make a positive argument of the fact that it did not even have management level personnel in each of its licensed communities, who could discern and report local community needs. CPB, however, joined with numerous citizen groups in opposing a local ascertainment exemption for state licensees.

Extensive historical arguments, discussed below, were made by state licensees. They claimed that the Commission's allocation of frequencies during the 1950's and 60's to state licensees proposing to operate on a centralized, simulcast basis constituted de facto recognition

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1/ 54 FCC 2d at 780.

that they were not governed by the local service rationale. The Commission, however, again rejected these arguments, in its Final Report and Order, released March 22, 1976:

> We believe the argument for statewide only ascertainment made by these network licensees -- i.e., that educational channel assignments were expressly designed to provide statewide coverage of at least one educational broadcast "umbrella" -- was not intended to, nor did it, defeat the concept of local service. The provision of a statewide reception service is not inconsistent with the existence of -- or a potential for -- local transmission services. We therefore shall require state networks to conduct a local ascertainment for each of their licensed stations having the capability to originate programming.

A footnote reference at the end of the above paragraph to "translators" as free from ascertainment requirements indicates that the Commission felt any facility more substantial than a translator (e.g., all separately licensed transmitter stations of most state networks) has the "potential for -- local transmission service", and therefore the "capability to" originate. Any contrary reading of this paragraph would be a radical shift from the Commission's two prior Notices, since very few network stations actually originate, and seems unintended.

At minimum, however, this order indicates FCC recognition of the thesis advanced by this paper -- that steps must be taken to integrate the state network licensee structure into the localism structure of national broadcast television, public and commercial.

4. The 1976 Challenge To the Georgia State Network's Operation Of Its Savannah Station

On March 1, 1976, a petition was filed against the license renewal of WVAN-TV, Savannah, Georgia, licensed to the Georgia State Board of Education. Savannah NAACP had attempted during the prior year to convince the state licensee of the need of the over 380,000 persons in WVAN-TV's service area, (in particular, but not solely, the one-third Black population), for programming responsive to the specific local needs of Southeast Georgia.

The Georgia State Network, like AETC, has a Board appointed by the Governor. Like AETC, its first Black Board member was only recently appointed. No Board member is from Savannah. No ascertainment of the Savannah community, the NAACP alleged, was conducted.

The WVAN-TV station staff consists of four engineers and a janitor. It originates no programs. It carries only programming selected or produced by the central Atlanta production facility, which the NAACP claimed was not sensitive to Savannah needs and issues.

Thus the FCC has before it several recent decisions and currently pending proceedings in which it has been dealing on an ad hoc basis with state network questions. The call by Commissioners Robinson and Hooks for a detailed examination of this question will inevitably be answered,soon, at least in the AETC comparative hearing context and the Commission's decision on whether the Savannah challenge should be set for hearing.

C. The Historical Record

In looking at these questions, the historical record appears of little concrete value. Three separate sources: (1) the public broadcasting exemption from the multiple ownership rules, (2) the Commission's allocations of frequencies to state networks, and (3) the Carnegie Commission Report indicate that policy-makers have simply not faced up to the central conflict between the operating structure of state network licensees and the historic Communications Act scheme, as well as public broadcasting, emphasis on localism.

1. The Multiple Ownership Rule Exemption

The rationale for the FCC exemption of public stations from its multiple ownership rules is cloaked in mystery. The FCC's basis rulemakings on multiple ownership during the 1940's makes no distinction between commercial and noncommercial licensees.[1/] Commissioner Robinson has recently said in his KQED dissenting opinion that his research leads to the 1952 Sixth Report and Order on Television Allocations.[2/] But the actual exemption was apparently added without comment when the multiple ownership rules were revised in 1953.[3/]

The Commission in 1954 relied on this section, without giving a rationale, to assign two overlapping stations, over the objections of a potential commercial applicant, to AETC.[4/] Three years later, the Commission, in

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1/ See, e.g., 5 Fed. Reg. 2384 (1940); 6 Fed. Reg. 2284 (1941); 8 Fed. Reg. 16065 (1943).

2/ 1 P&F Radio Reg. Part 3, 91:601.

3/ Adding what is now Section 73.636(b) of the Rules. See Report and Order in Docket 8967, 18 FCC 288 (1953). One prior case dealing with radio allocations did articulate a rationale for exemption based on encouragement of "state-wide plans" for noncommercial service. See State of Wisconsin-State Radio Council, 16 FCC 459 (1952). But the FCC held that allocations in excess of the commercial standards would be relevant if there were a competing applicant for the frequency.

4/ Voice of Dixie, Inc., 11 P&F Radio Reg. 309 (1954).

another signal overlap case, cryptically stated only that "We were of the view that . . . [this exemption] was in the public interest at the time of its adoption."[1/]

In the 1960's, the Commission time and again automatically exempted public broadcasting from its multiple and cross-ownership rulemakings without explication.[2/]

In its August, 1975 decision refusing to apply across the board multiple ownership rules to the public broadcasting, the FCC specifically backed away because it felt this would raise serious problems for state public networks. But it again ducked the hard issue. It simply stated:

> The Commission has encouraged such networks and recognized the value they can have in addressing many matters of statewide importance. The public interest values inherent in such networks have been discussed amply elsewhere and no repetition here is required.[3/]

But the FCC makes no citation to its alleged "ample discussion" of the state network issue. And Commissioner Robinson stated that his research has uncovered no such discussion in the Commission's official records.[4/]

1/ Ponce de Leon Broadcasting Co., Inc., 15 P&F R.R. 3 (1957).

2/ See, e.g., 2 R.R. 1588 (1964); 13 R.R. 1526, 1532 (1968); 22 FCC 2d 306, 307, n. 4 (1970).

3/ 54 FCC 2d at 948.

4/ Dissenting opinion, KQED, Inc., FCC 76-269 (March 26, 1976).

One potential argument was listed at an earlier point in this decision as made by CPB. CPB, the FCC recites, says that state networks allow public broadcasting to reach rural audiences. But Columbus and Savannah, Georgia, Montgomery, Alabama, and many other communities where stations are licensed to state networks are not rural areas. And even those rural areas, if incapable of supporting a separate licensee, still deserve substantial input into state produced programs through representation on the network governing Board, local ascertainment and advisory committees, and local programming done on a remote, portable video or film basis.

Local service need not in all cases require extensive hardware and construction of a massive studio facility. This is a principal falacy of the assumptions apparently made by CPB, the FCC, and the state licensees themselves, if a "rural service" rationale is used.

2. FCC State Network Allocations Decisions

State licensees commenting on their proposed local ascertainment requirements presented detailed historical arguments in an attempt to show that the FCC never expected local service from state networks. Such allocations were often, they said, made without regard to normal allocation

principles as to community size and number of local assignments. In each case the applicant state agency fully informed the Commission of its intent to program on a centralized basis. This is all undoubtedly correct.

But the Commission still, in every case cited, never squarely faced the fundamental conflict between the system proposed by a state network and the FCC's basic local service mandate under the Communications Act. One explanation appears to be that in virtually every instance, the almost exclusive focus of the state agency was originally upon provision of an instructional service to all school systems in the state. The vast bulk of the allocations decisions pre-date the 1967 Public Broadcasting Act. They therefore predate the shift in focus away from a narrowly defined "educational" service that Act entailed as to the role and function of noncommercial television allocations, as part of the national telecommunications system.

When virtually all noncommercial reservations were expected to provide was daytime, in-school instructional programming, simulcasting this programming to supplement a uniform state-wide educational curriculum, the validity of

waiving the local service outlet requirement may have seemed self-evident. But once federal funds were allocated by CPB to state networks, either directly or indirectly through PBS, for public broadcasting, aimed at increasing the information, culture and entertainment available to all age groups and community segments in the hours not devoted to in-school instruction, FCC articulation of the duties of state networks, like those of other public licensees, should logically have shifted. Indeed, the instructional school television programming still carried in the daytime might better have been moved to alternative distribution means, such as point-to-point service (ITFS -- Instructional Television Fixed Service) or video cassette.

That FCC recognition of the shift in public television's aims and duties did not occur until the 1973-76 public broadcasting ascertainment rulemaking is probably simply due to regulatory inertia and lag.[1/]

1/ This recognition is also finally evident as to public radio broadcasting in the Commission's recent Notice of Proposed Rulemaking as to rule changes for noncommercial educational FM stations (Docket 20735), FCC 76-240, April 19, 1976.

3. The 1967 Carnegie Commission Report

The legislative history of the Public Broadcasting Act seems not to have addressed the state network problem directly. The Carnegie Commission Report downplayed the continuing role of over the air instructional television.[1/] It did, on the other hand, emphasize the paramount need for furthering local responsiveness and identification of public stations:

> To be truly local, a station must arise out of a sense of need within a community, must have roots in the community, and must be under community control. It is not the physical location of studio and transmitter that is significant but the degree to which the station identifies itself with the people it seeks to serve.[2/]

Attached to the Report was a hypothetical model of a fully developed national public television system. (Alexander, "Costs of a Nationwide Educational Television System"). This model proposed 210 originating stations, and 170 repeating stations. This indicates that this consultant, at least, and perhaps the full Commission, believed that program origination capability -- as then known -- could not be available to all communities.

1/ Public Television: A Program for Action (1967), pp. 80-84.

2/ Id. at 34.

But this model does not by itself provide the answer. First, this model is outdated because it speaks as if all origination required studio capability. Small-format video, with the capability of being transformed fairly inexpensively to air quality tape has been a subsequent development of crucial importance.

Secondly, even within this model, stations with "basic" local origination capability are hypothesized for all communities with a 1980 population of over 140,000. This would include a substantial member of the larger state network communities not presently served with other than simulcast programming.

Thus historical sources are at best fragmentary and inconclusive. This argues that policy-makers in this field should instead take a fresh look at the current feasibility of hastening state network provision of local origination, or at least locally responsive service, even if a central origination facility is still employed on an interim basis.

The Major Areas of Re-examination

In attempting to rethink the proper role and function of the state network licensee, policy-makers will be focusing on at least five crucial areas:

1. Governing Board Structure

2. Ascertainment (including continuous ascertainment mechanisms such as local advisory councils)

3. Local v. Central Program Origination

4. Equal Employment Opportunity Responsibility

5. First Amendment Issues Raised By State Control of Program Content

It is beyond the scope of this paper to deal with each of these in depth. But some crucial issues in each area can be identified:

1. Governing Board Structure

The representativeness, or lack thereof, of state network governing boards has been a principal issue in the AETC and Georgia Network cases. The most current available CPB data for 15 state network boards shows an aggregate of 176 males and 36 females. Of the 212 total, 18 are Black, 1 Hispanic, none Native American, and none Asian-American. More detailed analysis on a state by state basis is necessary to establish substantial disparity with area minority populations. But the male-female ratio seems unrepresentative on its face. From the figures available to us only a single Black member sits on the state governing board in Alabama, New Jersey, Mississippi, Georgia (added since the survey) and South Carolina, and no Blacks apparently serve in Kentucky.

Equally important is geographical representation from among the communities to which the state's licenses are allocated. Even rural areas should not be excluded. In fact, they should be included because of the very distinctiveness of their often minority concerns as opposed to these of a state's large urban areas.

The amount of time these Boards accually devote to public broadcasting is another serious question. Even where a Board's sole function is to govern the state network, it may meet frequently. But where the licensee is a State Board of Education, a State University Board of Regents, or other multi-purpose entity, it is highly unlikely that it will have the time to provide meaningful input, no matter how representative its membership. New institutional arrangements are necessary in such cases.

2. Ascertainment

While the FCC has laid down the broad parameters of required continuous ascertainment, this process remains to be implemented. The FCC has encouraged use of such off-air and on-air feedback mechanisms as public meetings, used with success by the CPB Board in rotating visits to cities around the country. Surely a state network governing board

can at least rotate open, well-publicized public meetings among its licensed communities during the course of a year (or, perhaps, where a great number of localities are involved, over the three-year renewal period).

More regular contacts, at least by station management, with a specific ongoing local citizens advisory council in each area served could also be used to supplement this irregular Board feedback mechanism. Other devices, such as a well-promoted on-air "ascertainment week", with persons phoning in toll free from around the state to register their concerns (not for once, to pledge money), could be effectively used by a state licensee to keep in contact with its disparate licensed communities.

The irony is that most state licensee comments in the ascertainment rulemaking took the attitude that engaging in such activities took time away from busy station management's central activities and purposes. There was little recognition that without this effort to put localism into practice on the state level, one form of central decision-making in a vacuum on such issues as SPC purchases merely replaces another, on the national level, that the state licensees had recently objected to.

3. Local vs. Central Program Origination

There are economies of scale that require national production. There are also economies of scale that can make regional or state network programming appealing for discussion of certain common issues. But there is still room for the immediately local.

Providing local origination, or at least coverage of local issues, does not always mean building full studios in each licensed community, although many existing state network communities clearly deserve such a capability. But a film crew or small-format video producer can be sent into any licensed area, no matter how rural, to obtain information or cultural presentations of specific interest to that community. If done well they will also be of interest to the rest of the state. Not all programs that result need be about one community exclusively. Material on a common issue from differing perspectives might be shot in segments in each of the network's licensed service area.

One problem with public broadcasting stations, in the author's experience, is their preoccupation with accumulating plant and hardware, obtained through HEW grants and elsewhere, at the expense of the more mobile forms of

creating and transmitting video communication. A willingness to leave that expensive plant and studio, no matter how much it cost to put it into place under earlier conceptions of what was needed for a documentary or weekly magazine, and get into the field with 3/4 inch cassettes, is needed. The studio-based programming perception of some state networks needs to be reversed.

The critically important issue, which the Carnegie Report put its finger on, is the belief by each licensed community that it has a real stake in its local public station. It supports that station through its tax dollars, and it should speak at least partially to their specific concerns.

4. Equal Employment Opportunity Responsibility

An interesting phenomenon is that while many state networks speak of themselves as a single entity, and some file a single renewal application covering all of their licenses as to programming, they do treat each individual licensed station as an entity in itself for purposes of filing annual employment reports with the FCC. This means that when less than 5 employees service a transmitter, no report need be filed. It also, intentionally or not, reduces more glaring and obvious statistical disparities between station workforce and minorities and women in the area population that appear when the figures are aggregated.

And what figures form the statistical comparison -- the whole state, or the licensed communities vis-a-vis the small local station engineering staff?

For example, Citizens Communications Center is currently preparing a study of equal employment at all public broadcast stations from annual reports filed in 1975. Where state networks filed for each station, a composite report was attempted. No such report could be compiled for the South Carolina network because each individual station reported fewer than five full time employees, and thus submitted no statistical breakdown to the FCC.

Attached to this paper are the statistics for state networks that could be pieced together. They do not break down statistics by high pay and responsibility positions, which may show a far greater disparity. But the existing disparity at many networks even in gross workforce is substantial.

A unique EEO issue, apart from general compliance with FCC affirmative action rules, is raised by state network licensees. In some instances, as in Georiga, the licensee must rely on a state civil service system for its pool of employees. Such a licensee may be frustrated by a separate bureaucracy in even sincere attempts to comply with the FCC requirement of a positive, dynamic effort to

bring minority and female applicants into their employment selection pool, either directly or through on the job training and scholarship programs. A state statute may in effect delegate this function to a separate state agency which does not hold the license.

The Georgia Network/Savannah license challenge raises the question whether this may, in fact, be unacceptable delegation of a non-delegable licensee function. This issue is ironically exacerbated by the FCC's current suspicion of any involvement by local citizens in licensee employment decisions as potentially unlawful "delegation."

5. First Amendment Issues

The activities of all public broadcasting stations have not been held to constitute "state action" for constitutional purposes because of their receipt of federal funds, reserved channel allocations, or any other theory. A concurring opinion of Justice Douglas in the Columbia Broadcasting System v. Democratic National Committee case, [1] involving a claim of right of access to the commercial broadcast medium to air political or issue-oriented messages, raised that possibility. But this remains a yet unaccepted theory by the majority of any federal court.

1/ 412 U.S. 94 149-50 (1973).

State network licensees, however, clearly do engage in "state action", whatever the potential that doctrine has for being applied to CPB, PBS, or other public station licensees. The consequences for the state's right to editorial control over the matter it airs on such a station has been explored in a lengthy law review article.[1/] In brief, the author concludes that the state can edit but must do so by clearly delineating where editorial responsibility lies in the system and shielding it from selective and arbitrary intervention by a politically appointed Board or other state political entities.

Another useful article, which examines all state laws relating to public broadcasting,[2/] focuses on several laws that prohibit certain program content on public television. Prohibitions on religious programming, in order to protect the church-state separation, are found in two states, and statutes concerning airing of political advocacy or discussion in several others. A Mississippi statute even bars any programming by a named sex education information group.

1/ See Canby, "The First Amendment and the State as Editor: Implications for Public Broadcasting", 52 Texas L. Rev. 1123 (1974).

2/ Sadowski, "What the State Laws Say About Noncommercial Broadcasting," Public Telecommunications Review (October, 1974).

The real issue is that state network licensees are clearly more fearful of controversy than community licensees. Community stations may irritate one portion of their membership, or their foundation, or their corporate, support. But they do not have almost all their eggs in one politically senstive basket, the state legislature. Some state licensees, such as Maryland, have attempted to build a membership base and tap other alternative funding sources. To the degree that they can do so effectively and build an alternate constituency, their political vulnerability will be lessened. But several states bar or discourage outside fund-raising by their public networks, leaving them without this potential shelter from political whim.

6. The Radical Solution: Phased Replacement of State Network Licensees

The last point raises clearly what the previous discussion implies. Should the response to this litany of dangers and problems with state network licensees be in fact a phased replacement by community licensees? Should there really be any need to go through the hearing in AETC, or for that matter if any area of a state covered by a governmentally owned network has matured sufficiently in knowledge about and concern for public television that a local non-profit group can form and operate on the frequency as a community public licensee?

This paper's other suggestions have been designed to alter the dynamics within the existing structure of a single state licensee with multiple licensed outlets. But it is possible that the FCC not only made the wrong choice by bending the rules all these years, but should not attempt to rectify that error by mere tinkering with the system but by starting fresh.

At least the FCC could announce a general policy of giving an existing licensee operating as a central network a demerit of near-dispositive weight as against a community applicant who files a competing application and who shows (1) financial ability to raise funds to operate and (2) a locally responsive board, membership, and ascertainment structure, programming plan, and affirmative action program. This might eliminate the need for a comparative hearing in most cases.

It would at least let interested local parties know they had a fighting chance to bring true localism to their state. If, after further legal analysis there is a serious question whether the FCC has the authority to do so, a statutory amendment should be sought.

After all, the apparent historical rationale for the state to step into public broadcasting in the first place was that no other entity had the resources to bring even a minimal educational/informational broadcast service to the state. If that basic assumption is now shown to be false in a particular state, the rationale for allowing waivers of all traditional FCC rules and policies disappears, and the local, non-governmental group should have the substantial if not dispositive preference.

7. Allocations Alternatives

Instead of replacement, an even more substantial shift in priorities, and substantial additional government funding, might enable a dual public broadcasting system to be created in each state. At least on the UHF band, there may be sufficient excess capacity to apportion new channels to local groups wishing to provide a local production/origination alternative in addition to state network simulcast central production and simulcast programming.

But the inefficient use or non use of existing dual allocations to the same licensees in several communities, an issue outside the scope of this paper, does not argue well for such a policy.[1/] As the Commission's recent rulemaking decisions in this area have recognized, time-sharing between

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1/ See KQED, Inc., supra.

the state network and a local community licensee of the same allocation and transmission facilities might be encouraged as a more practical short-term process. 1/

CONCLUSION

Until either of these solutions occur, other agencies should continue to monitor this aspect of PTV structure. CPB has adopted a policy of stimulating local origination by treating state network stations who originate as separate licensees deserving of an additional community service grant. Both Wisconsin and Sourth Carolina have moved toward local autonomy and origination at stations outside the network core.

CPB can also continue its policy of funding conferences on local programming. It is currently considering an experimental proposal to provide public television licensees, including state networks, with instruction in the use of small-format video equipment. This would free state licensees from at least the technical constraints on local origination.

HEW can make activation of local origination facilities within state networks a priority. And it can be hospitable to requests from local community groups wishing to discuss contingent start-up facilities grants in order to compete with an existing state network allocation.

2/ See the Commission's August 13, 19765 Order, 54 FCC 2d at 948-49 and its April 19, 1976 Notice at ¶30 and n. 27.

The FCC should narrowly define what it means by origination capability in its local ascertainment requirement imposed on state network stations. If the new ascertainment trigger is interpreted as a retreat from the initial FCC position that a transmitter equals origination potential, and therefore a local obligation, the FCC should reaffirm its original position. If it means that only when a station actually begins origination it must ascertain, such a standard would act as a serious deterrent to initiation of local origination by state networks.

Congress should reexamine the entire question of allocations priorities in public broadcasting with the FCC, particularly if the FCC fails to act consistent with its statutory mandate to stimulate local service by all licensees, including state public networks, or to replace them with community licensees. Congress should also examine HEW priorities under the Facilities Act to see that HEW places emphasis on funding local origination facilities for currently centralized network states, or local community-based licensees seeking to replace state network licensees.

The state licensees, of course, will hopefully be seeking ways to make replacement by community licensees less necessary, because of drammatically increased responsiveness to local licensed community concerns. If they welcome local ascertainment as a creative challenge, ultimately reflected in locally based programming, they could do so.

But the issue of high political sensitivity would still be present, despite any structural alterations in governmentally-run television stations. For this reason alone, perhaps the best hope still lies in a return to the true local licensee premise of the Carneigie Commission and the Communications Act.

State networks with more than two stations

Alabama ETV Commission (9) STATIONS
2101 Magnolia Ave.
Birmingham, Ala 35205
Mr. Robert Dod, General Manager
205-328-8756

Connecticut ETV Corporation (4)
24 Summit St.
Hartford, Conn. 06106
Mr. Paul K. Taff, President and General Manager
203-278-5310

Georgia ETV Network (8)
1540 Stewart Av. SW
Atlanta, GA 30310
Dr. Richard E. Ottinger, Executive Director
404-656-5979

Hawaii Public Broadcasting Authority (5)
KHET-TV
2350 Dole St.
Honolulu, HI 96822
Ms. Mary G.F. Bitterman, Executive Director
808-955-7878

State Educational Radio and TV Facility Bd. (4)
P.O. Box 1758
Des Moines, Iowa 50306
Dr. Thomas Ditzel, Executive Director
515-280-1120

Kentucky Authority for Educational TV (13)
600 Cooper Dr.
Lexington, KY 40502
Mr. O. Leonard Press, Executive Director
606-233-0666

Maine Public Broadcasting Network (4)
Alumni Hall, University of Maine
Orono, ME 04473
Mr. John R. Morrison, General Manager
207-866-4493

Maryland Public Broadcasting Commission (7)
Maryland Center for Public Broadcasting
11767 Bonita Av.
Owings Mill, MD 21117
Dr. Frederick Breitenfeld, Jr., Executive Director
301-356-5600

Mississippi Authority for ETV (8)
P.O. Drawer 1101
Jackson, Miss. 39205
Mr. William R. Smith, Jr., Executive Director
601-982-6565

Nebraska Educational TV Commission (8)
P.O. Box 83111
Lincoln, Neb. 68501
Mr. Jack G. Mc Bride, General Manager
402-472-3611

U of NH
New Hampshire Network (5)
Box Z
Durham, NH 03824
Mr. Keith J. Nightbert, Manager
603-862-1047

New Jersey Public Broadcasting Authority(4)
1573 Parkside Ave.
Trenton, NJ 08638
Dr. Lawrence T. Frymire, Ex. Dir. and G.M.
609-882-5252

U of NC
UNC-TV (8)
304 NCNB Plaza
Chapel Hill, NC 27514
Dr. George Bair, Dir. of Educational TV
919-933-8191

South Carolina ETV Commission (~~5~~ 7)
Drawer 1
Columbia, SC 29250
Mr. Henry J. Cauthen, President & G.M.
803-758-7201

South Dakota ETV Board (4)
310 East Clark St.
Vermillion, SD 57069
Mr. Martin P. Busch, Executive Director
605-624-4497

U of Vermont
Vermont Educational Television (4)
Ethan Allen Ave.
Winooski, VT 05404
Mr. John W. Dunlop, Station Manager
802-656-3311

Educational Communications Board (4)
732 North Midvale Blvd.
Madison, Wisc. 53705
Tony Moe, Executive Director PAUL MORTON
608-266-0036

OEPBS (3)
Box 1097
Portland, Or 97207
Dr. Donald S. Bryant
503-229-4887

APPENDIX

Minority Employment Percentages of 17 State Network Grantees and States

State	Number of Stations	Percentage of Minority Employment at Station in Network	Percentage of Minority Representation in State
Alabama	9	7.0	26.6
Connecticut	4	16.3	6.5
Georgia	8	2.6	26.2
Hawaii	2	50.0	61.2
Iowa	3	0	1.5
Kentucky	13	4.5	7.7
Maine	4	0	0.7
Maryland	3	11.6	18.6
Mississippi	8	10.0	37.2
Nebraska	8	0	3.4
New Hampshire	5	1.6	0.6
New Jersey	4	14.0	11.4
North Carolina	8	6.8	23.4
Oklahoma	2	11.8	11.1
South Carolina	5	no composite report	30.7
South Dakota	3	0	5.3
Vermont	4	0	0.4